87-1660

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

JIMMY AND MARIA MARINEZ,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD JUDICIAL DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

I.

In the absence of state legislation, does the fourth amendment of the United States Constitution require a mechanical knock and announce rule in order to render the execution of a search warrant reasonable, or should a totality of the circumstances approach be used?

II.

Assuming, *arguendo*, that some type of a knock and announce rule applies, after having knocked and announced, were police required by the fourth amendment to stand at the threshold of the open doorway and wait to be invited in by the occupants?

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OPINION BELOW

The opinion of the Appellate Court of Illinois, Third Judicial District, is reported at 160 Ill. App. 3d 349, 513 N.E.2d 607 (3d Dist. 1982) (See Appendix B). The order of the Illinois Supreme Court denying leave to appeal is not reported, but is attached hereto (See Appendix C).

JURISDICTION

The opinion of the Illinois Appellate Court, Third Judicial District, was filed on September 15, 1987. A timely petition for leave to appeal was filed by petitioner in the Illinois Supreme Court. On February 3, 1988, an order denying the petition for leave to appeal was entered.

This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3). The instant petition for writ of certiorari is filed within 60 days of the Illinois Supreme Court's order denying leave to appeal. United States Supreme Court Rule 20; 28 U.S.C. section 1257(3). The decision of the Illinois Appellate Court, Third Judicial District, was premised upon federal constitutional grounds and does not rest upon any independent state ground.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment IV, provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Illinois Revised Statutes 1985, chapter 38, paragraph 108-8 provides that:

> All necessary and reasonable force may be used to effect an entry into any building or property or part thereof to execute a search warrant.

STATEMENT OF THE CASE

Defendants, Jimmy Marinez and Maria Marinez, were indicted on a charge of possession of a controlled substance with the intent to deliver. (C. 21) Following the return of the indictment, defendants filed a motion to quash search warrant and suppress evidence. The motion alleged not only that the warrant was obtained without probable cause, but that the warrant was illegally executed in that police failed to comport with the knock and announce requirement. (C. 26-27) On December 4, 1986, a hearing was conducted.

The evidence adduced at the suppression hearing revealed that a search warrant was obtained by police for the residence located at 207 East Clinton Street, Joliet, Illinois, on September 16, 1986. (R. 47) Phillip Valera, a city of Joliet police officer assigned to the Metropolitan Area Narcotics Squad (MANS) unit testified that he was instrumental in obtaining the search warrant. (R. 71-72, 75) At approximately 8:10 p.m. that same day, Officer Charles Stein, along with three uniformed officers and seven other MANS agents (including Valera), arrived at the residence to execute the search warrant. (R. 46-47, 48) All of the MANS agents present were dressed in standard raid jackets described as navy blue windbreakers with three-inch high white lettering stating "MANS Police" on both the front and back. (R. 48, 51, 72) Prior to obtaining the search warrant, policy had been informed that firearms, specifically, a 9 millimeter pistol and an Uzi machine gun were present within the residence. (R. 65-66)

After the officers arrived at the Clinton Street address, a number of the officers approached the rear door. As Stein approached the back door, he held a flashlight in

one hand and his service revolver in the other. As he ascended the rear stairs, Stein yelled, "Police officers, search warrant" three or four times in a very loud voice. (R. 49, 73-74) As he reached the back door, using the butt of his flashlight, Stein knocked on the door two or three times. As he did so, Stein simultaneously yelled, "Police officers, search warrant." As Stein knocked on the rear door with his flashlight, the door opened. After the door had completely opened, Stein and the other officers immediately entered saying, "Police officers, search warrant." (R. 50, 57-58, 59-60, 74, 77)

Stein testified that the flashlight he possessed that evening was 12 to 18 inches long and very heavy. He testified that he had knocked fairly hard on the back door two or three times using the butt end of the flashlight. (R. 57-58) As he knocked on the door, it began to open. However, because of an opaque covering over the glass of the door, Stein was unable to discern whether anyone from within was actually opening the door. It was not until after the door had fully opened that Stein determined that it was probably his knocking that had caused the door to open. (R. 59-60) Photographic exhibits of the back door of the residence, admitted by defendant (Def.'s Exhibits 6, 7), evidenced three indentation marks on the back door. (R. 60-61) With respect to defendant's exhibits 6 and 7, defendant, Maria Marinez, testified that the indentations on the door were never present before the evening of September 16, 1986. (R. 91) Stein testified that throughout this time he was yelling, "Police officers, search warrant" (R. 65) as was Officer Valera. (R. 73-74)

According to the testimony of Francis and Santiago Marinez (the mother and father of defendant Jimmy Marinez and mother-in-law and father-in-law of defendant Maria Marinez (R. 8-9, 37-38)), on the day and time in

question, they did not hear the police officers knock or announce prior to entering the residence. (R. 18-19, 20, 26-28, 39) Their testimony indicated that the police had simply burst into the kitchen of the apartment pointing guns and yelling at them to "hit the floor." (R. 19-20, 25-26, 42-43) However, Santiago Marinez could not remember if the people who had entered the premises were yelling, "Police officers, search warrant" as they entered. (R. 42-43) The testimony of Maria Marinez was to the same effect. (R. 31-32, 37)

Upon completion of the testimony and hearing oral arguments (R. 94-106), the trial judge took the matter under advisement. (R. 106) On December 5, 1986, the trial judge rendered his decision. After making his findings of fact (R. 109-17), the trial judge determined that the police had violated the knock and announce rule in executing the search warrant. (R. 117-18) The trial judge specifically determined that the knock and announce rule was of constitutional dimension. (R. 111) Although he found that the police had in fact knocked and announced their authority and purpose, he also determined that they did so as they simultaneously entered the premises once the door had opened. In chastising police for the manner in which the warrant was executed, the trial judge determined that the officers should have remained outside the threshold of the doorway without entering once the door had opened and waited for the occupants to invite them in. (R. 114-15, 117-18) As a result of the trial judge's findings of fact and conclusions of law, he granted defendants' motion to quash the warrant and suppress evidence. (R. 122) (Copy of oral pronouncement and order attached as Appendix A)

Following the trial judge's granting of defendant's motion to quash the warrant and suppress evidence, the Illinois prosecutor filed a timely notice of appeal (C. 48) and

the requisite certificate of impairment. (C. 46-47) On appeal to the Illinois Appellate Court, Third Judicial District, the prosecutor not only attacked the trial judge's substantive ruling concerning the alleged violation of the knock and announce rule, but also raised issues addressing the constitutional underpinnings of the knock and announce rule and the application of the exclusionary rule. The Illinois Appellate Court determined that although the failure to knock and announce does not *per se* violate the constitution, it nonetheless is a factor in determining whether the entry to search is constitutionally reasonable. In this case, the Illinois Appellate Court determined that the police conduct did not comport with the knock and announce rule thus violating defendant's fourth amendment rights. *People v. Marinez*, 160 Ill. App. 3d 349, 513 N.E.2d 607, 610 (3d Dist. 1987). In so ruling, the Illinois Appellate Court addressed both the constitutional issue and the factual issue concerning the officers' conduct. The Illinois Appellate Court's determination of the knock and announce issue rested solely upon application of the fourth amendment of the United States Constitution and was not premised upon any independent state grounds.

Following that determination, petitioner timely sought leave to appeal the decision of the Illinois Appellate Court in the Illinois Supreme Court. However, on February 3, 1988, leave to appeal was denied. (See Appendix C)

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

IN THE ABSENCE OF STATE LEGISLATION, THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION DOES NOT REQUIRE A MECHANICAL KNOCK AND ANNOUNCE RULE IN ORDER TO RENDER THE EXECUTION OF A SEARCH WARRANT REASONABLE, BUT A TOTALITY OF THE CIRCUMSTANCES APPROACH SHOULD BE USED INSTEAD.

Illinois has no statutory requirement that a police officer must knock and announce prior to executing a search warrant. *People v. Ouellette*, 78 Ill. 2d 511, 401 N.E.2d 507, 509 (1979); *People v. Conner*, 78 Ill. 2d 525, 401 N.E.2d 513, 515 (1979). In point of fact, the applicable Illinois statute provides as follows:

> All necessary and reasonable force may be used to effect an entry into any building or property or part thereof to execute a search warrant. [Ill. Rev. Stat. 1985, ch. 38, par. 108-8.]

Thus, in light of the lack of any specific statutory enactment pertaining to a knock and announce requirement, the question becomes whether there is a legal premise upon which to base such a mechanical rule. More specifically, the question presented is whether the fourth amendment of the United States Constitution mandates a mechanical "knock and announce" rule. To date, this Court has yet to rule specifically upon this question, having reserved judgment on the constitutionality of a knock and announce requirement. See *Sabbath v. United States*, 391 U.S. 585, 591, n.8, 88 S.Ct. 1755, 20 L.Ed.2d 828 (1968); *Conner*, 401 N.E.2d 515; *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114, 121 (1987), *cert. denied*, ____ U.S.

____, 108 S.Ct. 180 (1987); LaFave, *Search and Seizure*, section 4.8, at 271 (2d ed. 1987). Despite the lack of a specific ruling by this Court with respect to this federal question, both the Illinois Appellate Court, Third Judicial District, and the Illinois Supreme Court have addressed the constitutional dimension of the issue, in effect elevating the knock and announce requirement to constitutional proportions. *See Ouellette*, 401 N.E.2d 509; *People v. Marinez*, 160 Ill. App. 3d 349, 513 N.E.2d 607, 609 (3d Dist. 1987); *People v. Clark*, 144 Ill. App. 3d 7, 494 N.E.2d 166, 168 (3d Dist. 1986).

The petitioner maintains that the knock and announce rule is not required by the fourth amendment. In *United States v. Nolan*, 718 F.2d 589 (3d Cir. 1983), the court was called upon to address an issue similar to that raised by the petitioner in the instant case, albeit dealing with the federal knock and announce requirement of 18 U.S.C. section 3109. The Third Circuit Court of Appeals, upon consideration of the divergent purposes of the fourth amendment and 18 U.S.C. section 3109 (federal knock and announce statute), concluded that the latter does not embody a constitutional requirement. In explaining their conclusion, the court stated:

> . . . While the purposes and origins of the knock and announce and of the fourth amendment requirements are similar, they are not identical, and the purposes of the latter properly should be more carefully guarded. The fourth amendment was originally fashioned to outlaw the use of general warrants and writs of assistance, which allowed agents of the government arbitrarily to conduct searches for evidence of wrongdoing, to the detriment of individual privacy; "[t]he colonial experience under the writs was unmistakably 'fresh in the memories of those who achieved our independence and established our form of government.' " *Ker, supra*, 374 U.S. at 51, 83 S.Ct. at 1638

> (Brennan, J., concurring & dissenting) (footnote omitted) (quoting *Boyd v. United States*, 116 U.S. 616, 625, 6 S.Ct. 524, 529, 29 L.Ed. 746 (1886)). The goal of curbing arbitrary government power to intrude at will into an individual's privacy differs from the goals of the knock and announce requirement, which addresses only the manner in which a legitimate and inevitable government intrusion into the target person's privacy is to take place. Such an intrusion, it is true, can be made in a way so violative of the privacy and property rights of the occupants of the dwelling as to be unreasonable within the meaning of the fourth amendment, see *Ker, supra*, but not every violation of the statute will present such an unreasonable intrusion. [718 F.2d at 602.]

The adoption of the fourth amendment was precipitated by the abuse of search warrants. *Sgro v. United States*, 287 U.S. 206, 210, 53 S.Ct. 138, 77 L.Ed. 260 (1932). The mandate of the fourth amendment requires adherence to judicial processes, and searches conducted outside that judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the fourth amendment. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Mincey v. Arizona*, 437 U.S. 385, 390, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). Thus, the fourth amendment's requirements are plain and straightforward: In order for a search and seizure to be reasonable, a warrant must first be obtained from a judicial officer after providing facts establishing probable cause. Once the warrant authorizing the search of a particular place and seizure of the particular thing(s) has been issued, the police have fully satisfied the fourth amendment's mandate in that regard. It is the judicially-issued search warrant which then gives the police the power and authority to enter an individual's private domain, search it, and seize that which the warrant permits. Here, the knock and

announce rule adds nothing to the reasonableness mandated by the fourth amendment. *Nolan*, 718 F.2d 602; *State v. Vrtiska*, 406 N.W.2d 121.

Although the petitioner suggests that a knock and announce rule is not required by the fourth amendment, this is not to suggest that once police have a warrant they may use whatever means are available to them to execute the warrant. Of course, police conduct in executing a search warrant may, under certain circumstances, be so outrageous that it shocks the conscience of the court and would be considered unreasonable. *Cf. Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952); *Ker v. California*, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963); *Tennessee v. Gardner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). However, the reasonableness in the execution of a search warrant should be judged on a totality of the circumstances approach as opposed to a mechanical or subjective formulation like the knock and announce standard now employed. The interests of both the fourth amendment and law enforcement are satisfactorily balanced by using a totality of circumstances approach. Under this approach, the entire transaction is viewed to determine the propriety of police conduct when executing a search warrant. Minor transgressions will not automatically render the execution of the search warrant constitutionally unreasonable thereby resulting in the suppression of relevant evidence as is now the case under the mechanical and subjective knock and announce requirement promulgated as the law in Illinois.

The petitioner maintains that the totality of the facts and circumstances surrounding the entry indicate that the police conduct here was reasonable. The officers, armed with a judicially-authorized search warrant, approached defendants' home, knocked, and loudly announced their

presence and purpose. However, as a result of the officers' knocking on the door, the door opened. The officers did not force the door open or intentionally turn the knob to open the door. Their subsequent entry made through the open door using no force whatsoever (other than knocking) after they had knocked and announced is not the type of entry which the courts have condemned as unreasonable. *United States v. Nolan*, 718 F.2d at 601-02; *People v. Bares*, 97 Ill. App. 3d 728, 423 N.E.2d 538 (2d Dist. 1981). The officers' uninvited entry through the open doorway did not vitiate the reasonableness of the manner in which police executed the search warrant. *Cf. People v. Masters*, 155 Ill. App. 3d 1015, 508 N.E.2d 1163 (4th Dist. 1987).

The officers' conduct here was not unreasonable under the circumstances. If a totality of the circumstances approach would have been employed, as opposed to the mechanical application of the knock and announce standard, it is evident that this case simply would not have warranted suppression of the evidence. As such, the decision of the trial judge granting defendants' motion to quash search warrant and suppress evidence should have been reversed. *United States v. Nolan*, 718 F.2d at 602; *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114, 121-22 (1987).

Accordingly, the Illinois Appellate Court, Third Judicial District, incorrectly decided an important question of federal law which has not been settled by this Court. For this reason, the petitioner urges that a petition for a writ of certiorari be granted to review the issue.

II.

ASSUMING, *ARGUENDO,* THAT SOME TYPE OF A KNOCK AND ANNOUNCE RULE APPLIES, AFTER HAVING KNOCKED AND ANNOUNCED, POLICE WERE NOT REQUIRED BY THE FOURTH AMENDMENT TO STAND AT THE THRESHOLD OF THE OPEN DOORWAY AND WAIT TO BE INVITED IN BY THE OCCUPANTS.

Assuming, *arguendo,* that some form of a knock and announce requirement is required by the fourth amendment, the question then becomes whether the police conduct sufficiently comported with the requirements of the knock and announce rule, thereby establishing the reasonableness of the officers' conduct in executing the search warrant. The resolution of this issue is not only fact specific, but also entails a legal determination of what was constitutionally reasonable police conduct under the fourth amendment once the door opened.

The singular factual aspect which makes this case unique for fourth amendment purposes is the manner in which the door opened during the execution of the search warrant. It is undisputed that Agent Stein knocked on the rear door of defendants' premises three times with the butt end of his flashlight concomitantly announcing, "Police officers, search warrant." However, although apparently closed, the door was not completely secured. As a result, with each knock by the officer, the door opened. Although the blows were of sufficient force to leave three one-inch indentations in the door, no damage was done to the lock mechanism. Furthermore, because the glass in the back door was opaque, Agent Stein was unable to determine if someone from within was opening as he knocked. Only when the door was completely opened, did the agent discern that no one from within the residence was opening the door. It is at this point that the constitutional ques-

tion presents itself: Were the officers required by the fourth amendment to remain outside the threshold of the residence and await an invitation from the occupants before entering? What conduct was reasonably expected of these officers when faced with this situation? The People submit that the officers' conduct in immediately entering the residence once the door had opened, regardless of the fact that it opened as a result of the police having knocked at the door in compliance with the knock and announce rule, was reasonable under the fourth amendment. It is further submitted that, whenever police in the execution of a search warrant approach a residence and the door is either already opened or opens as a result of the officer's knocking, police may enter the premises immediately without permitting the occupants an opportunity to invite the officers in.

The function of the knock and announce requirement, assuming there is such a requirement, is to notify the occupant of the presence of police so that (1) the potential for violence to the police and occupants may be diminished; (2) the occupant's privacy will be protected by allowing him to surrender his privacy voluntarily; and (3) the destruction of private property is prevented. *People v. Ouellette*, 78 Ill. 2d 511, 401 N.E.2d 507, 510 (1979); *People v. Conner*, 78 Ill. 2d 525, 401 N.E.2d 513, 516 (1979). However, in those situations that the door to a residence is already opened upon police arrival or opens as a result of police comporting with the knock and announce requirement, it is questionable whether the salutary purposes behind the knock and announce requirement are substantially furthered by requiring police to wait outside the threshold to await an invitation to enter. It appears that the principle so enunciated by the Appellate Court in *Marinez* might actually be inapposite to the fourth amendment.

Although the fourth amendment has drawn a firm line at the entrance to a home, the doorway to an individual's home is not an impregnable barrier. Thus, for fourth amendment purposes, the People maintain that once the door of defendant's residence is opened, be it already in that state when police arrive or as a result of the police conduct in knocking on the door, the police may reasonably cross that threshold to execute the search warrant without first having to await an invitation to enter from the occupants within. What defendant voluntarily and knowingly places or exposes to the public, even in his own home, is not a subject of fourth amendment protection. *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The People submit that an occupant of a residence has a reduced expectation of privacy whenever the door to the residence is opened, since the threshold is, for fourth amendment purposes, considered a public place. *See United States v. Santana*, 427 U.S. 38, 42, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976); *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976).

What is presented by this case is a situation unbeknownst to the officers that at the time they knocked on the rear door to defendants' residence, they were about to knock on a door which had not been completely secured. As they knocked, the door opened. Suddenly, the officers found themselves standing at the threshold of an opened door to an apartment for which they not only had a search warrant to search for drugs but were also informed that firearms might be present. Under the circumstances, the People maintain that the fourth amendment did not require the officers to remain outside the threshold of that doorway to wait for an invite to enter from within. Instead, the fourth amendment permitted the officers to immediately enter the residence in order to secure the premises

not only for their own safety, but also to prevent possible destruction of any evidence. Requiring the police to simply stand at the threshold of the completely opened doorway for which they had a search warrant to look for drugs and to await invitation by the occupants is unreasonable and presents a perilous situation to officers' safety in general. Although no apparent harm was imminent to these officers, this determination only can be made on hindsight. However, to require as a general proposition that officers must remain outside the threshold of an open door until invited in requires more than what the knock and announce rule encompasses as well as the fourth amendment.

Examining the facts of this case, the People submit that the execution of the instant search warrant was not unreasonable. No right of privacy was infringed by the officers' entry since the door opened albeit as a result of the officer's knocking. However, there is no indication that the officers knew that the door had not been properly secured prior to knocking. Thus, this was not a "forced" entry or breaking generally condemned by the fourth amendment. Instead, everything that the police did here clearly indicates a design to comport with the fourth amendment. *See United States v. Nolan*, 718 F.2d 589, 602 (3d Cir. 1983). The opening of the door exposed to the officers' view the interior of the residence. Furthermore, they did not physically intrude into the home until *after* they had already announced their presence and purpose. Thus, it cannot be said that the police entry was so unreasonable under the fourth amendment that it required exclusion of the evidence found therein.

The People conclude that the Appellate Court's underlying rationale is fatally erroneous. The officers' conduct in immediately entering the residence once the door had

been opened was reasonable under the fourth amendment. Under the circumstances, the People submit that the announced but nonconsensual entry by police to execute the search warrant was not, by itself, an unreasonable intrusion prohibited by the fourth amendment.

CONCLUSION

For the reasons and arguments stated herein, the Petitioners respectfully request that a writ of certiorari issue to the Appellate Court of Illinois, Third District, to review that court's decision which affirmed the trial judge's decision to grant defendants' motion to quash search warrant and suppress evidence.

Respectfuly submitted,

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APPENDIX A

Transcript of Proceedings Before
Hon. Bruce Falk on December 5, 1986

[R. 109] THE COURT: 86CF-930, Marinez. This matter comes on for decision after having been taken under advisement at the conclusion of testimony yesterday on a motion to quash a search warrant.

The basis of the motion was the alleged illegal execution of the warrant, itself, based upon a forcible entry without prior—or without announcement prior to the police officers entering into the residence.

No allegations were presented regarding the obtaining of the warrant or the sufficiency of the basis for the issuance of the warrant.

The undisputed facts, at least, the facts that are uncontroverted by the testimony are not many. The search warrant was duly issued for a residence located at 207 Clinton, Joliet, Illinois; that address is a house; that at the time of the execution of the warrant on September 16th of 1986, at approximately eight p.m., was being rented by the defendants, Jimmy Marinez and his wife, Maria Marinez. They resided there with their two children.

At the time the warrant was served, Frances Marinez, the mother of the defendant, Jimmy Marinez, and the mother-in-law of Maria, and Jimmy [R. 110] Marinez, also known as Santiago Marinez, who is the father of the defendant, Jimmy Marinez, and the father-in-law of Maria Marinez, were visiting at the residence. The defendant, Maria Marinez—excuse me—yeah, Maria Marinez was at home with the two children. The defendant, Jimmy Marinez, was not at home or present during this search.

Immediately prior to the entry of the police, Frances Marinez was in the kitchen reading a newspaper. Maria was in the bathroom with her older daughter, Stacey. Mr. Marinez was in the living room watching T.V. The two dogs owned by the defendants were outside of the house near the back door which opened into the kitchen. The back door was not locked, but it was closed, although there was a glass window area to the door. It was not clear glass, and it could not be seen through. It was dark outside. The door was not opened voluntarily by anyone inside the house.

Both Santiago Marinez and Frances Marinez sustained bruises as a result of being placed on the kitchen floor after the police entered, and Santiago Marinez' bruises were to his stomach area where apparently he landed on the floor. Frances Marinez' [R. 111] bruise was to her arm where she was held or forced to the floor.

Upon the entry of the police, the police had their weapons drawn. The law in this case is fairly clear. The parties have furnished to the Court certain case citations which the Court has read and reviewed. Those case citations from both sides agreeing and comport with what the Court's understanding is of the law is in this area.

First of all, Chapter 38, Section 108-8, paraphrasing, allowing all necessary and reasonable force to be used in the execution of a warrant. The Fourth Amendment certainly protects against all unreasonable searches and seizures, including a search and seizure that is found to be unreasonable because of the improper exercise or execution of a validly issued warrant.

In Illinois, there is no statutory requirement to announce police officers' authority or presence or purpose prior to the execution of the warrant, and it is not a, per

se, Constitutional violation to fail to announce presence, authority or purpose before executing a warrant, but it is a factor, a consideration for the Court to note, something to be [R. 112] considered in determining whether or not the entry under the facts and circumstances of a particular case is a reasonable one and a lawful one. So, the so-called knock and announce rule is not really a rule as much as it is a circumstance to be considered by the Court, and absent exigent circumstances, it's generally held by the courts that officers are expected to announce their presence and purpose prior to entry.

The purpose of that requirement is stated in the case of People versus Seybold, S-e-y-b-o-l-d, 423 Northeast 2nd 1132; where it states that the purpose of the requirement that officers announce their authority and purpose before entering the home is to notify those inside of their presence in order to afford them the opportunity to respond so that violence can be averted and privacy protected.

People versus Clark. It is stated that—at 494 Northeast 2nd 168—that the so-called knock and announce rule does not exist in a vacuum; neither is it a creation of misguided libertarians. The rule serves the dual salutary purposes of avoiding violence and protecting personal privacy.

That pretty much ends what has been [R. 113] either disputed, uncontradicted or agreed to by the parties.

The parties dispute certain other factual situations regarding the entry of the police into this residence and disagree on the application of the law to this particular situation.

With regard to the disputed facts, the Court will make the following determinations and findings of fact. Having reviewed the evidence, considered reasonable inferences to be drawn from the evidence and considering the credi-

bility of the witnesses and their testimony as presented in court, the agents that came on the scene to execute this warrant on the night of September 16th were dressed in, I suppose what I can call an undercover raid uniform, which would be a dark blue windbreaker that contained white lettering on the front and back that identified them as—or that said M.A.N.S. Police. I believe it says M.A.N.S. on the front. Police on the back. It may be the other way around, but in white lettering approximately three inches high. There were regular uniformed officers on the scene, also; however, they were not part of the initial group that entered the residence. They were not the [R. 114] first or second or third officer into the residence, but they did enter the residence shortly after the initial entry.

When I say, regular uniformed officers, those are officers in their formal police officers' uniforms, which in Joliet consist of blue uniforms, cap, patches, weapons, belts and badge.

The police—and there is no dispute about this, also—that when they entered, the police had their weapons drawn. The police announced their presence, and they announced who they were; specifically, Officer Stein, and there may have been other officers behind him, also, yelling, while Officer Stein, who was the first agent on the porch area, was knocking on the door.

There were no announcements made prior to by any officers, Stein being on the porch and pounding on the door.

The dogs, at least one of them, were barking and making noise, and knocking by Officer Stein consisted of, at least, three blows to the door area with the butt of a five battery flashlight. The blows were of sufficient force to leave three-inch indentations in the door area, adjacent to the door [R. 115] handle, immediately adjacent or with-

in the proximity of the doorknob, above it and to the left. The blows were made in an immediate and rapid succession, the pounding or a knocking, one, two, three, and their force was sufficient to cause the door to open. The door opened quickly. The lock, however, was not broken.

Upon the opening of the door, the agents burst in. They were running, first Officer Stein. As they ran in, they yelled words to the effect that they were police. They told the occupant of the kitchen specifically to get down.

Officer Stein proceeded then past the occupant of the kitchen. As a matter of fact, hardly remembering if there even was an occupant of the kitchen, saying that to the best of his memory there was one, but she posed no threat, so, he went immediately by her to another area of the house to secure the residence.

The State cites two cases to the Court claiming analogous fact circumstances that justify the entry in this case. Those cases are People versus Boykin, 328 Northeast 2nd 1369; People versus Mathes, 387 Northeast 2nd 39. First there was a prior announcement [R. 116] of the police presence in Boykin. There was announcement of the police presence, a passage of some period of time, I forget, ten to fifteen seconds, I believe, during which time the police heard some movements on the inside of the residence, receiving no response, and then went in.

In Mathes, a warrant executed in the middle of the day; again, prior announcements. I believe in this, on that day, on at least two occasions before the entry, and no response at all before the entry into a downstairs hallway, and then they went further upstairs.

Neither of those cases are analogous to this situation, as the defendants point out the case of People versus Clark is almost exactly on point.

In the Clark case, unlike the distinction which the State sought to draw in argument regarding this matter, that there was no prior announcement, the facts as determined were undisputed as stated in the Appellate Court opinion. Again, if I didn't cite it before, it's 494 Northeast 2nd 166.

There the officers took a battering ram and blasted the defendant's front door open while [R. 117] announcing their authority. They didn't announce their authority before they blasted in. They did it while they were blasting in.

In this case, there was a battering ram present. It was not used, but in this case, also, the authority took place contemporaneously, simultaneously, at the same time the officers were banging in the door. The fact that they didn't used a battering ram and used a flashlight with sufficient force to force in the door is a factual distinction which does not make any legal distinction to the Court's mind.

The officers gave the occupants of this house no opportunity to answer their call. In fact, when the door was opened, if it was inadvertent, giving the police the benefit of the doubt that the blows with this flashlight, sufficient enough to dent in what appears to the Court to be a wooden-frame type door, were inadvertent in attempting to open the door, were only for the purpose of—while they were announcing their presence, even given the benefit of that, upon the door opening, there was nothing to prevent the police from staying at the threshold upon seeing a middle-aged woman seated, reading at the kitchen table and announcing who they were and why they were there [R. 118] and what their purpose was without bursting by her, and the second and third agent, whatever agent, forcing her down to the floor with such force that she had a bruise on her arm, and basically, terrorizing her.

The Court finds one of the reasons for the discrepancy in the testimony regarding what happened as to Frances Marinez is that more than likely she was terrorized by the police bursting into this house, that while the dogs barked, that wasn't the things that she would remember, and while the police were wearing their uniforms, that isn't what she would remember. She would remember seeing a bunch of strange people dressed in weird outfits running into her house and yelling. That would probably be the things that would remain impressed upon her mind. I believe that's what was impressed upon her mind, and I believe that's what the police did in this case.

So, the factual situation, with the exception of the battering ram, if you substitute the flashlight for the battering ram, you have just about an identical situation; the police forcing in the door and running through the house. That conduct [R. 119] was condemned in Clark. That apparently has made no difference to the agent and the same police agency, the same police authority that executed this warrant.

The Court must make a further inquiry to determine whether or not there were exigent circumstances that existed that would authorize the conduct in this case.

Exigent circumstances to be considered are the nature of the thing to be searched for. In this case are narcotics, which are easily disposed of, possible danger to the police officers, presence of weapons, possibility of escape by the people inside.

The Court has looked at those factors and the other factors which the evidence in this case has brought up which might be considered as exigent to justify the police conduct. The Court can find no exigent circumstance that would justify the police conduct in this matter.

The quote from Clark, I think, is again appropriate where it says, "that the so-called knock and announce rule does not exist in a vacuum; neither is it a creation of misguided libertarians. The rule serves the dual salutary purposes of avoiding violence [R. 120] and protecting personal privacy; where as here, the police exhibit a blatant disregard for these concerns. We do not hesitate to suppress the fruits of this ill-begotten escapade."

The Court finds no distinction between battering a door down with a ram and forcing it open with a heavy flashlight or kicking it in. The police have changed the—in this agency has changed the physical object with which they do their search. They haven't changed their tactics or method from the Clark case, which is decided in July of 1986, about two—strike that. It was decided May 30th of 1986, rehearing denied July 8th, just a few months prior to this raid.

The Court can sympathize with the police who are doing this type of work, and it is a dangerous type of work, but we are not at war with the citizens of this country, and the price we pay for having a free society is to be allowed to remain in our homes, every citizen, unless there is legal process used as a reason to violate that privacy, and there are ways to do it, and there is no question that they are not the most efficient ways to combat the drug problem, to combat crime. They are not the [R. 121] most efficient ways.

The safeguards that are placed there by the Constitution and by the statutory and case law authority do not make it easier for the most part for the police to execute these warrants or to stop criminal activity. That is the flipside of the coin that we pay for being in a free society.

I believe it was Jamaica that established a very effective gun control policy. They randomly went through houses, not one at a time, but many at a time, with no warrants, with no reason, other than to look for weapons. When they found the weapons, the people were hauled off and given secret trials and incarcerated. That's a very effective gun control policy. One I'm sure that the American people would not stand for, be it guns, drugs, or anything else.

The rules are there to protect everyone. On occasion, someone that has perhaps no less right to the protection, but is doing things that are beyond the rules and gets away with it, that unfortunately is the price that has to be paid to protect the rest of us. That's the nature of the game. Eventually, it catches up.

[R. 122] The Court is going to grant the motion to suppress and quash the warrant and suppress the items seized on that warrant and charge a written order to Mr. Polito.

MR. MOCK: Your Honor, if I could ask to make one further specific finding of fact, if the Court should choose to, for possible appeal by the State?

THE COURT: All right.

MR. MOCK: And I may be in error, but I believe it was my rememberance of the testimony by Officer Stein that they were yelling "police officers" as they were running up to the porch. Are you making a specific finding that you don't believe that occurred, or is it your memory that you don't remember them saying that?

THE COURT: I remember Officer Stein's testimony. I have reviewed my notes of Officer Stein's testimony that reflect that he stated, and I believe he was the only wit-

ness that stated, although my notes are—might not be correct on that, but he did state, at least, that as they were going up to the porch he announced their presence in a loud voice. I'm not sure if he said that in the duration of that statement or not. I find the credible evidence in this case to be that the announcement took place contemporaneously [R. 123] with the pounding on the door. I believe I stated that in the earlier decision. If it's unclear, that's the finding that I make.

* * * * *

APPENDIX B

Opinion Of The Appellate Court Of Illinois
Third Judicial District

Case No. 3-87-0005
[Publ. In Full]

Filed 9-15-87 Received Sep 16 1987

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D. 1987

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

v.

JIMMY MARINEZ and MARIA MARINEZ,

Defendants-Appellees.

Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois

No. 86-CF-930

Honorable **Bruce Falk,** Judge Presiding

JUSTICE STOUDER delivered the opinion of the court:

Defendants, Jimmy and Maria Marinez, were charged with possession of a controlled substance with the intent

to deliver. Prior to trial, the defendants filed a motion to quash the search warrant and to suppress the evidence based upon the constitutionally impermissible procedure employed by the police in executing the warrant. The defendants claim that the officers failed to knock on the door and announce their authority and the reasons for their presence prior to the execution of the warrant. The trial court granted the motion and the State filed a timely notice of appeal.

Prior to the search of the Marinez residence, agents of the Metropolitan Area Narcotice Squad (MANS) obtained a search warrant. The warrant did not list the Marinez family as the people who were the subject of the search. The name on the warrant as the occupant of the premises was Eddie Rodriguez. The agents believed Rodriguez was the occupant of 207 E. Clinton as a result of surveillance conducted during the investigation. A controlled buy of cocaine was conducted and the police tailed the purchaser to 207 E. Clinton. Numerous vehicles were present at the address. A check of the license plates revealed the owner of one of the vehicles to be Rodriguez, a good friend of the defendants. Rodriguez's license check showed a Sterling Avenue address, but the MANS agents knew Rodriguez no longer lived at this address. It was on this basis that police believed Rodriguez to be the occupant of 207 E. Clinton.

The MANS agents knew Rodriguez to possess firearms. In a search conducted in 1985 of Rodriguez's old address, numerous loaded handguns were seized, along with a quantity of cocaine and cannabis. Police also had information that an "Uzi"-type machine pistol and a nine millimeter handgun were located at the residence. On the basis of the controlled buy and this other information, MANS agents obtained the warrant.

On September 16, 1986, prior to the time MANS agents executed the warrant, the Marinez's were at home with Jimmy's parents and their two children. One other person had visited the home that night. When the visitor left, Jimmy's mother testified that she had closed the back door but not locked it. Her testimony was that she closed the door until it "clicked" shut.

When the police arrived to execute the warrant, they went around to the back door of the residence. The agents' testimony indicated that as they ascended the stairs to the back door they yelled "police officers, search warrant" numerous times. The first agent to reach the door stated that he had his flashlight in one hand and a service revolver in the other. The glass in the back door was either translucent or opaque in nature so that anyone on the outside could not see into the residence. As one of the agents knocked on the door with the flashlight, the door began to open; a little further with each knock. The blows were of sufficient force to leave three one-inch indentations in the door but no damage was done to the lock mechanism. When the agent discerned that no one was opening the door and that it was the knocks with the flashlight that caused the opening, the agents entered the house and conducted their search while the residents were instructed to lay on the floor. The search netted a nine millimeter handgun, found in a kitchen cabinet, and a certain quantity of a controlled substance.

The residents of the house said that they heard nothing prior to the back door slamming open and the agents entering. The agents were all wearing blue jackets with the words "MANS Police" in four-inch-high white letters. While Jimmy's mother clearly remembered closing the door until it "clicked" shut, she stated she did not hear the agents yelling "police officers, search warrant" nor

did she recall seeing the white lettering on the blue jackets.

At this juncture, we note that the sufficiency of the probable cause to obtain and the issuance of the warrant itself were not contested. Rather, this case centers on the execution of that warrant. Specifically and initially, we address the "knock and announce" rule when placed in the equation of what constitutes a reasonable search. Second, and on the basis of the trial courts' holding that the agents did "knock and announce", we must determine whether, under the facts of this case, an announcement by the agents of their identity and purpose coupled with a simultaneous or contemporaneous entry circumvents the purpose of the "knock and announce" rule.

The purpose of the "knock and announce" rule is to notify the person inside of the presence of police and of the impending intrusion, give that person time to respond, avoid violence, and protect privacy as much as possible. (*People v. Ouellette* (1979), 78 Ill.2d 511, 518, 401 N.E.2d 507, 510.) Illinois has no statutory requirement that an officer must announce his authority and purpose. The Illinois Supreme Court has stated that "the mere failure of police to announce their authority and purpose does not *per se* violate the Constitution, [although] it may influence whether subsequent entry to arrest or search is constitutionally reasonable." (*People v. Wogemuth* (1977), 69 Ill.2d 154, 166, 370 N.E.2d 1067, 1072.) Where exigent circumstances exist, the failure of police to knock and to announce their authority and purpose in the execution of a search warrant does not violate the fourth amendment right against unreasonable searches and seizures. *People v. Ouellette* (1979), 78 Ill.2d 511, 401 N.E.2d 507.

However, the specifics needed to find that exigent circumstances exist, thereby alleviating the need for the police to knock and announce, must have some basis in the facts of the particular case. For example, the mere fact that narcotics, which by their very nature are easily destroyed, are the subject of the search does not in and of itself create an "exigent circumstance" which would justify the police in failing to knock and announce. (*People v. Ouellette* (1979), 78 Ill.2d 511, 401 N.E.2d 507.) In *Ouellette*, the Illinois Supreme Court held that the existence of narcotics located on a dresser near but outside the bathroom (where the narcotics could easily be flushed down the toilet), coupled with the fact that the defendant never permitted anyone who came to the door to enter until fully identified, did not present the necessary exigency. 78 Ill.2d 511, 401 N.E.2d 507; see also *People v. Clark* (1986), 144 Ill.App.3d 7, 494 N.E.2d 166.

Nor does information indicating the presence of weapons alone create an "exigent circumstance." The theory behind announcement of purpose and authority encompasses protection of the police officer as well as avoidance of confrontation generally. Although each situation merits individual analysis, the necessity that police provide notice of their presence seems more compelling in the face of startling someone in possession of a weapon. In such a case, compliance with the "knock and announce" rule should be excused "only where the officers reasonably believe the weapon will be used against them if they proceed with the ordinary announcements." *People v. Ouellette* (1979), 78 Ill.2d 511, 401 N.E.2d 507 (quoting *People v. Dumas* (1973), 9 Cal.3d 871, 878, 512 P.2d 1208, 1213.)

We have determined that the trial court was correct in its determination that the information accumulated by

the MANS agents was insufficient to supply the requisite exigent circumstances which would permit them to dispense with the "knock and announce" rule. There was no specific information that the narcotics were kept in a place which would facilitate their immediate destruction. Nor was there any information to suggest that the occupant carried the weapon on or about his person, that he had ever used the gun, or that there was any danger to the agents from the use of the weapon. On this basis, there was no reason to excuse the agents from failing to knock and announce their presence and intent.

We next address the issue which is fact specific to this particular case. Assuming that the agents did knock and announce their presence and intent, did the simultaneous entry render a reasonable search—made so by a valid search warrant and a knock and announce—unreasonable. This question can be answered simply by examining the purpose of knocking and announcing.

As we have stated previously, one of the purposes of the "knock and announce" rule is to give the defendant time to respond to the presence of the police. If the entry into the dwelling is simultaneous with the knock and announce, that purpose is thwarted. Therefore, if the necessary exigent circumstances are absent and the police knock and announce their presence and intent, they must, in turn, give the occupants of the dwelling time to respond. To hold otherwise would effectively eliminate the need to ever consider the "knock and announce" rule.

For the foregoing reasons, the judgment of the Circuit Court of Will County is affirmed.

Affirmed

BARRY, P.J., and WOMBACHER, J., concur.

APPENDIX C

Order Of The Supreme Court Of Illinois Denying Leave To Appeal

[*Letterhead Of*]

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2038

February 3, 1988

State's Attorneys Appellate Prosecutor
Third Judicial District
P. O. Box 645
Ottawa, IL 61350

No. 66024— People State of Illinois, petitioner, v. Jimmy Marinez, et al., respondents. Leave to appeal, Appellate Court, Third District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 25, 1988.